

1 (January 2, 1996)

2 **Minority And Women's business Enterprise (MWBE) Participation**

3 **Policy And MWBE Obligation**

4 (1). *Policy* It is the policy of the Contracting Agency that minority and
5 women's businesses shall have the maximum practicable opportunity to
6 participate in the performance of contracts under this agreement.

7
8 (2). *MWBE Obligation* The Contracting Agency and its Contractor agree to
9 ensure MWBEs have the maximum practicable opportunity to participate
10 in the performance of contracts and subcontracts financed by the
11 Contracting Agency funds provided under this agreement. In this regard
12 all Contractors shall take all necessary and reasonable steps to ensure
13 MWBEs have the maximum practicable opportunity to compete for and
14 perform contracts. The Contracting Agency and its Contractors shall not
15 discriminate on the basis of race, color, national origin, or sex in the
16 award and performance of this State contract.

17
18 The Minority Business Policy Statement and the MWBE obligation cited
19 above shall be made a part of all subcontracts and agreements entered into
20 as a result of this contract.

21
22 **Definitions**

23 When referred to in this contract, the terms Minority, Minority Business
24 Enterprise (MBE), and Women's Business Enterprise (WBE) will be
25 construed to have the following meanings:

26
27 *Minority* means a person who is a citizen or lawful permanent resident of
28 the United States and who is:

29
30 (a) Black: having origins in any of the black racial groups of Africa;

31
32 (b) Hispanic: of Mexican, Puerto Rican, Cuban, Central or South
33 American, or other Spanish or Portuguese culture or origin,
34 regardless of race;

35
36 (c) Asian American: having origins in any of the original peoples
37 of the Far East, Southeast Asia, the Indian subcontinent, or the
38 Pacific Islands; or

39
40 (d) American Indian or Alaskan Native: having origins in any of the
41 original peoples of North America.

42
43 *Minority Business Enterprise, Minority-owned Business Enterprise, or*
44 *MBE* means a business organized for profit, performing a commercially
45 useful function, which is owned and controlled by one or more minority
46 individuals or minority business enterprises. Owned and controlled
47 means a business in which one or more minorities or MBE's own at least
48 fifty-one percent (51%), or in the case of a corporation at least fifty-one
49 percent (51%) of the voting stock, and control at least fifty-one percent
50 (51%) of the management and daily business operations of the
51 business.

1
2 *MWBE* means a minority owned business enterprise, a women-owned
3 business enterprise, and/or a combination minority and women's
4 business enterprise certified by the Office of Minority and Women's
5 Business Enterprises (OMWBE) of the State of Washington.
6

7 *Women's Business Enterprise, Women-owned Business Enterprise, or*
8 *WBE* means a business organized for profit, performing a commercially
9 useful function, which is owned and controlled by one or more women or
10 women's business enterprises. Owned and controlled means a
11 business in which one or more women or WBE's own at least fifty-one
12 percent (51%) or in the case of a corporation at least fifty-one percent
13 (51%) of the voting stock, and control at least fifty-one percent (51%) of
14 the management and daily business operations of the business. The
15 women owners must be United States citizens or lawful permanent
16 residents.
17

18 *Minority/Women's Business Enterprise* means a minority owned
19 business enterprise, a women-owned business enterprise; and/or a
20 combination minority and women's business enterprise certified by the
21 OMWBE of the State of Washington.
22

23 **MBE/WBE Eligibility**

24 Minority and Women's Business Enterprises proposed by the bidder to be
25 used on this project shall be shown as a MBE or WBE on the current list of
26 firms accepted as certified by OMWBE or who can produce written proof from
27 OMWBE showing they were accepted as certified as such prior to the date
28 fixed for opening bids. Such certifications are made pursuant to authority
29 granted by chapter 39.19 RCW, title 326 WAC, and any other applicable
30 laws.
31

32 A consolidated list of firms accepted as certified by OMWBE is available at
33 nominal cost from that office.
34

35 Firms not meeting the above requirements at the time fixed for the opening of
36 bids will not be accepted by the Contracting Agency for the purpose of
37 meeting the goals as stated below.
38

39 In the event the apparent low bidder proposes to use a firm that is certified at
40 the time of the submission of the bid, and that firm is determined to be
41 ineligible prior to the execution of the contract, the apparent low bidder will be
42 required to substitute another certified firm to meet the goal, at no additional
43 cost to the Contracting Agency.
44

45 If, at the time of bid opening, a certified business is projected to perform work
46 classified in a standard industrial classification (SIC) code not listed for the
47 business in either the directory of certified businesses published by the
48 OMWBE records of that office, the Contracting Agency's determination, prior
49 to award, that the business will perform a commercially useful function shall
50 prevail over the listed SIC code(s) in determining whether the MBE and/or

WBE participation goals established for the contract are met. The presence or absence of SIC codes shall not be a basis for protest of an award.

Joint Venture Approval

Money spent on contracts awarded to joint ventures can be counted toward goal attainment when the procedure outlined in this specification is followed.

- a. Contents of joint venture agreement. The joint venture agreement must be in writing and signed under penalty of perjury by all of the joint venturers. Each joint venture agreement shall specify the contribution made by each joint venturer; the control each will exercise; the potential for profit or loss and the distribution thereof. Each of these elements must be allocated in proportion to their contribution. The joint venture agreement must also identify the commercially useful function the joint venture will perform and the part of the work each joint venturer will do. The agreement must also specify which participant(s) are MBEs and which are WBEs and give documentations of OMWBE certification.
- b. Requests for approval. Any joint venture may request approval by the Contracting Agency. The request must be in writing, must include a written joint venture agreement and must contain a statement that gives the Contracting Agency authority to audit the joint venture. A prospective bidder will not be given a bid proposal unless the bidder has submitted the joint venture agreement at least seven calendar days before the date of opening bids for a specific project. The agreement shall conform to the requirements of subsection (a) of this section. The Contracting Agency will approve a joint venture which submits an agreement that contains each of these specified elements.
- c. Time of request. A request for approval of a joint venture must be submitted and approved before the time fixed for bid opening.
- d. Effect of approval. A joint venture is approved for only one specific contract. Disbursement of funds to an approved joint venture shall be counted toward goal attainment as described in WAC 326-30-100(3)(f).
- e. Investigation. The Contracting Agency may request additional information from an enterprise seeking approval as a joint venture. Failure to provide the requested information shall result in the denial of the request for approval.
- f. Complaints. Complaints regarding the opposition of validity of an approved joint venture shall be written and shall be made to the Contracting Agency. The Contracting Agency will fully investigate each complaint and issue a written report of its findings. The report will be provided to the complainant and to the joint venture.

MBE/WBE Goals

In order to comply with the stated MWBE requirements, the Contracting Agency has established goal(s) in the amount(s) of:

2
3 The Contracting Agency expects that the bidder shall make every effort,
4 through negotiations and/or written solicitations with the MWBE firms, to meet
5 the above specified goal.
6

7 **MBE Utilization Certification**

8 The bidder shall submit with the bid, a Minority Business Enterprise and
9 Women's Business Enterprise Utilization Certification which has been made
10 a part of the proposal. This certification shall be used to determine whether
11 the bid is responsive to the MBE/WBE requirements in the invitation to bid
12 and whether a bidder has complied with the MBE and/or WBE goal(s). The
13 Contracting Agency will consider as non-responsive those bids submitted
14 which do not contain the certification, which contain a false certification, or
15 which display insufficient projected use of MBE and/or WBEs.
16

17 **Counting MBE/WBE Participation Toward Meeting Goals**

18 MBE/WBE participation shall be counted toward meeting the project goals in
19 accordance with the following criteria:
20

- 21 a. Except as specified below, the total dollar value of the contract
22 awarded to the MBE/WBE is counted toward the applicable
23 MBE/WBE goals.
24
- 25 b. Contracts performed totally by a combination MWBE, or partially by
26 a combination MWBE shall be counted by dividing the total dollar
27 value of the contract or portion of contract performed by the
28 combination MWBE by two. One-half of the dollar value will be
29 counted toward the MBE goal and one-half will be counted toward
30 the WBE goal when the contract contains both MBE and WBE
31 goals. When the contract contains only an MBE goal or a WBE
32 goal, only one-half of the dollar value of the combination MWBE's
33 goal shall be counted toward the goal.
34
- 35 c. The dollar value of contracts with an MBE/WBE owned and
36 controlled by minority women can be counted towards either the
37 MBE contract goal or the WBE contract goal but not to both on the
38 same project. The Contractor or Contracting Agency may choose
39 how the contract value is applied to the goal.
40
- 41 d. A portion of the total dollar value of a contract with an eligible joint
42 venture equal to the percentage of the ownership and control of the
43 MBE/WBE partner in the joint venture will be counted toward the
44 MBE and/or WBE goal(s).
45
- 46 e. As described below, expenditures for materials and supplies
47 obtained from approved MWBE manufacturers and regular dealers
48 are counted toward the MBE and/or WBE goal(s), provided that the
49 MWBE assumes the actual and contractual responsibility for the
50 provision of the materials and supplies.
51

1 (1) Manufacturers. A Contractor may count toward its MBE/WBE
2 goal 100 percent of its expenditures for materials and supplies
3 required under a contract and obtained from a MBE/WBE
4 manufacturer only if the Contracting Agency approves the
5 description of the MBE/WBE responsibilities for manufacturing
6 the supplies in advance of the bid opening. To obtain the
7 Contracting Agency approval, the bidder or manufacturing firm
8 must submit a written request which must be received by the
9 Contracting Agency no later than ten days prior to bid opening
10 describing the manufacturing process which the MBE/WBE will
11 perform. Once a firm's manufacturing process has been
12 approved in writing it is not necessary to resubmit the firm for
13 approval unless the manufacturing process has substantially
14 changed. If the Contracting Agency approval of the
15 manufacturing process is not obtained prior to the time fixed for
16 opening bids, the expenditure to the proposed MBE/WBE
17 manufacturer cannot be counted. Counting of the MBE/WBE
18 amount may be allowed as a regular dealer or as a service
19 provider as described below.
20

21 For purposes of this section, a manufacturer is a firm that owns,
22 operates or maintains a factory or establishment that produces
23 or creates from raw materials or substantially alters goods
24 before reselling them.
25

26 (2) Regular Dealers. A Contractor may count toward its
27 MBE/WBE goal 100 percent of its expenditures for materials
28 and supplies required under a contract and obtained from a
29 MBE/WBE regular dealer only if the Contracting Agency
30 approves the regular dealer in advance of bid opening. To
31 obtain approval, the bidder or regular dealer must submit a
32 written request which must be received by the Contracting
33 Agency no later than ten days prior to bid opening describing
34 the regular dealer's responsibilities. Once a firm's regular
35 dealer status has been approved in writing it is not necessary
36 to resubmit the firm for approval unless the operating
37 procedures have substantially changed. If the Contracting
38 Agency approval of the regular dealer's status is not obtained
39 prior to the time fixed for opening bids, the expenditure to the
40 MBE/WBE regular dealer cannot be counted at 100 percent.
41 Partial counting of the MBE/WBE amount may be allowed as a
42 service provider as described below.
43

44 For purposes of this section, a regular dealer is a certified
45 business that owns, operates, or maintains a store, warehouse,
46 or other establishment in which materials or supplies required
47 for the performance of the contract are bought, kept in stock,
48 and regularly sold to the public in the usual course of business.
49 To be a regular dealer, the firm must engage in, as its principal
50 business and in its own name, the purchase and sale of the
51 products in question. A regular dealer in such items as steel,

1 cement, gravel, stone, and petroleum products need not keep
2 such products in stock if it owns or operates distribution
3 equipment. Brokers and packagers shall not be regarded as
4 regular dealers within the meaning of this section.
5

6 f. Service Providers. A Contractor may count toward its MBE/WBE
7 goal the following expenditures to certified MBE/WBE firms:
8

9 (1) One hundred percent of the dollar value charged may be
10 counted for the commercially useful function a broker or a
11 packager of materials or supplies required under a contract
12 performs in the procurement of essential personnel,
13 facilities, equipment, materials or supplies required for the
14 performance of the contract.
15

16 (2) One hundred percent of the dollar value of the fees
17 charged may be counted for a hauler, trucker, or delivery
18 service, but not also a regular dealer or the manufacturer
19 of the required materials or supplies required on the job
20 site, to deliver the required material or supplies.
21

22 (3) Twenty percent of the dollar value charged may be
23 counted for providing a bona fide service in the
24 procurement of transportation by a travel agency, shipping,
25 or transportation broker, or other business performing
26 similar functions.
27

28 (4) One hundred percent of the dollar value charged may be
29 counted for providing bonds or insurance specifically
30 required for the performance of a contract.
31

32 If any of the aforementioned manufacturer or supply services are
33 commercially unnecessary, such as the case when a firm acts only
34 as a passive conduit in the supply process or duplicates a service
35 provided by others in the same chain of supply from manufacturer to
36 purchaser, no credit will be granted toward the MBE and/or WBE
37 goal(s).
38

39 **Selection of Successful Bidder**

40 The successful bidder shall be selected on the basis of having submitted the
41 lowest responsive bid which has met the MBE and/or WBE goal(s) as
42 established elsewhere in these contract documents. Should the low and
43 otherwise responsive bidder fail to attain the goal(s), responsiveness shall be
44 determined on the basis of good faith efforts taken to attain the goal(s). The
45 Contracting Agency has established the following objective measurement of
46 good faith. Good faith shall be determined in light of the MBE and/or WBE
47 participation attained by all bidders and by comparing the MBE and/or WBE
48 participation to the average MBE and/or WBE participation by all bidders.
49 For purposes of computing the average MBE and/or WBE participation, only
50 that amount of the MBE and/or WBE goal attainment which does not exceed
51 the established goal shall be used. Should the low bidder's MBE and/or

WBE participation be lower than the average(s) in either category, the bid shall be considered non-responsive and shall be rejected. If the lowest bid is rejected, the next lowest bid, or bids, shall be examined under the foregoing criteria until the contract is awarded or all bids rejected.

MBE/WBE Contract Compliance

The Contracting Agency will notify the successful bidder of the award of the contract in writing and include a request for a further breakdown of the MBE and/or WBE information.

After award and prior to execution of the contract, the Contractor shall provide in writing to the Contracting Agency information describing the work to be performed by each MWBE, and the total price for each item to be paid to each MWBE on this project. The total price for all items to be paid to each MWBE shall not be less than the dollar amounts listed on the MWBE utilization certification for each MWBE. This information shall be included in the executed contract. Failure to provide information meeting the MWBE requirements shall be reason to cause forfeiture of the proposal bond or deposit of this bidder.

Only expenditures to MWBEs that perform a commercially useful function in the work of a contract will be counted toward the MBE and/or WBE goal. A MWBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether a MWBE is performing a commercially useful function, the Contracting Agency may evaluate the amount of work subcontracted, industry practices, and other relevant factors.

To ensure all obligations under contracts awarded to MBE and/or WBEs are met, the Contracting Agency shall review the Contractor's MWBE involvement efforts during the performance of the contract. The Contractor shall bring to the attention of the Contracting Agency any situation in which regularly scheduled progress payments are not made to MWBE subcontractors.

After execution, and throughout the life of the contract, where MWBE work is diminished or deleted by a Contractor proposed change order, or where the MWBE becomes ineligible or is unable or unwilling to perform, other work of equivalent value shall be substituted by the Contractor. Substitution shall be to the same MWBE, or to another certified MWBE to perform equivalent value work, at no additional cost to the Contracting Agency. Documentation of the Contractor's "good faith efforts" to provide a substitution may be accepted in lieu of an actual substitution of another firm.

In the event the MWBE expects to share the resources of the prime contractor in the form of facilities, financial assistance, equipment or personnel, a written plan describing the facilities, financial assistance, equipment or personnel to be shared shall be submitted by the Contractor to the Engineer for approval by the WSDOT External Civil Rights Branch before the MWBE commences work to ensure that no violation to the performance

1 of the commercially useful function occurs. If the MWBE is sharing
2 resources with other than the prime contractor, the above information shall be
3 provided as requested by the Engineer.
4

5 This information will be used by the WSDOT External Civil Rights Branch to
6 determine compliance with the commercially useful function requirements.
7

8 **Penalties for Noncompliance**

9 In accordance with WAC 468-16-180, the Contracting Agency may suspend
10 the qualification of the Contractor for up to six months for the continual failure
11 to comply with MWBE requirements.
12

13 In accordance with WAC 468-16-190, the Contracting Agency may revoke
14 the qualification of the Contractor for up to two years if the Contractor has
15 been suspended two or more times within a two-year period.
16

17 If the Contracting Agency contemplates suspension or revocation of the
18 Contractor's qualifications, the Contractor may request, in writing, that a
19 hearing be held as provided under WAC 468-16-200.
20

21 If a person, firm, corporation, or business does not comply with any provision
22 of this contract required under chapter 39.19 RCW, the Contracting Agency
23 may withhold payment, debar the Contractor, suspend or terminate the
24 contract, and subject the Contractor to civil penalties of up to ten percent of
25 the amount of the contract for each violation. Willful repeated violations,
26 exceeding a single violation, may disqualify the Contractor from further
27 participation in state contracts for a period of up to three years. When the
28 Contractor has been notified that it is to be assessed a penalty, the
29 Contractor may request, in writing, that a hearing be held as provided under
30 WAC 326-08-015.
31

32 **Further Information**

33 If further information is desired concerning Minority Business
34 Enterprise/Women's Business Enterprise participation, inquiry may be
35 directed to:
36

37 External Civil Rights Branch
38 Office of Equal Opportunity
39 Washington State Department of Transportation
40 Transportation Bldg., P.O. Box 47314
41 Olympia, WA 98504-7314
42 or telephone - (360) 705-7085.
43 Fax (360) 705-6801